

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DANIEL W. COCHRAN,

Petitioner,

v.

W. J. SULLIVAN, Warden

Respondent.

Civil No. 07cv2080 L (PCL)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a “Motion for Enlargement of Time” in the above referenced case. Petitioner asserts that he has a pending Writ of Habeas Corpus in the Southern District of California, however the Court has no record of Petitioner filing such an action. Therefore, the Court construes the present Motion as a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254.

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FAILURE TO USE PROPER FORM

Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with the Local Rules of the United States District Court for the Southern District of California. See Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be submitted upon a court-approved form and in accordance with the instructions approved by the Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-approved form. The correct forms are available free of charge from the clerk of the court and available upon request.

FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES

Further, habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.” Id. at 366 (emphasis added).

Petitioner alleges that he filed a Writ of Habeas Corpus on September 25, 2007, in the California Supreme Court but does not specify what claims were raised in that petition. If Petitioner has raised his claims in the California Supreme Court he must so specify. “The burden of proving that a claim has been exhausted lies with the petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998);

1 Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v. Allenbrand, 23 F.3d 292, 300
 2 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

3 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
 4 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
 5 of habeas corpus by a person in custody pursuant to the judgment of a State court. The
 6 limitation period shall run from the latest of:

7 (A) the date on which the judgment became final by the
 8 conclusion of direct review or the expiration of the time for seeking
 such review;

9 (B) the date on which the impediment to filing an application
 10 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 by such State action;

11 (C) the date on which the constitutional right asserted was
 12 initially recognized by the Supreme Court, if the right has been
 newly recognized by the Supreme Court and made retroactively
 13 applicable to cases on collateral review; or

14 (D) the date on which the factual predicate of the claim or
 15 claims presented could have been discovered through the exercise
 of due diligence.

16 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

17 The statute of limitations does not run while a properly filed state habeas corpus petition
 18 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).
 19 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
 20 when its delivery and acceptance [by the appropriate court officer for placement into the record]
 21 are in compliance with the applicable laws and rules governing filings.”). However, absent some
 22 other basis for tolling, the statute of limitations does run while a federal habeas petition is
 23 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

24 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
 25 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
 26 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.
 27 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
 28 habeas relief because he has not alleged exhaustion of state court remedies.

CONCLUSION

In light of the above, the Court **DISMISSES** the Petition without prejudice for Petitioner's (1) failure to either pay the \$5 filing fee or move to proceed in forma pauperis, (2) failure to use the proper form, and (3) failure to allege exhaustion of state judicial remedies. If Petitioner wishes to proceed with this case, he must submit, **no later than January 4, 2008, (1) a First Amended Petition which cures the pleading deficiencies noted above, (2) a copy of this Order, and (3) the \$5.00 fee or adequate proof of his inability to pay the fee .**

The Clerk of Court is directed to send a blank Southern District of California First Amended Petition form, and a blank In Forma Pauperis Application to Petitioner along with a copy of this Order.

IT IS SO ORDERED.

DATED: November 7, 2007



M. James Lorenz
United States District Court Judge